



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 7, 2001

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-40

The Honorable Jim McDermott
U.S. House of Representatives
Washington, DC 20515-4707

Dear Mr. McDermott:

This responds to your letter dated December 4, 2000, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the establishment of a legal expense fund and donations to the fund by other Members of Congress using their principal campaign committees.

You are a Member of the U.S. House of Representatives from the Seventh District of Washington. You have set up a legal defense fund named the Jim McDermott Legal Expense Trust ("Legal Expense Trust" or "Trust") for the purpose of paying legal expenses arising from the case of *Boehner v. McDermott*, a matter which is now pending before the U.S. Supreme Court. This fund is "separate and apart" from your principal campaign committee. You state that Representative Fortney H. (Pete) Stark of California and other members of Congress have offered to donate excess campaign funds to the Legal Expense Trust and have authorized you to ask whether such donations would be permissible under the Act.

Factual Background

Boehner v. McDermott

This matter involves a civil suit against you filed by Representative John Boehner of Ohio alleging that you knowingly disclosed an unlawfully intercepted communication

in violation of the Electronic Communications Privacy Act at 18 U.S.C. §§2511(1)(c), 2520. In December 1996, Mr. Boehner, then the Chairman of the House Republican Conference, participated, via cellular telephone from Florida, in a conference call with several other House Republican leaders. The participants discussed the leadership's response to findings about to be issued by the House Committee on Standards of Official Conduct ("Ethics Committee") with respect to the conduct of Speaker Newt Gingrich, and to the Speaker's expected agreement to accept a reprimand and pay a fine. The suit alleges the following: A Florida couple tape recorded the conversation from a police scanner in their car, and later met with a Democratic Representative from Florida to discuss the tape. At the Member's suggestion, the couple personally delivered the tape to you on January 8, 1997. You were then the ranking Democratic Member of the Ethics Committee. On the next day, you gave copies of the tape to three major newspapers, which then ran stories on the party leaders' conversation. Shortly thereafter, you provided a copy of the tape to the other Members on the committee and resigned from the committee. The committee chairman then delivered a copy to the U.S. Department of Justice.

No criminal charges were brought against you.¹ Mr. Boehner filed the civil suit against you in U.S. District Court in the District of Columbia in March 1998. In July 1998, the district court granted your motion to dismiss the case, concluding that your actions were protected by the First Amendment. *Boehner v. McDermott*, No. CIV. 98-594 TFH, 1998 WL 436897 (D.D.C. July 28, 1998). In September 1999, the U.S. Court of Appeals for the D.C. Circuit reversed the district court's decision and remanded the case back to the district court. *Boehner v. McDermott*, 191 F.3d 463 (D.C.Cir.1999). You filed a petition for *certiorari* on April 25, 2000. *Certiorari* has yet to be granted or denied.²

Legal Expense Trust Approved By House Ethics Committee

You enclose a copy of the letter from the House Ethics Committee, dated October 6, 2000, that conditionally approved the establishment of the Legal Expense Trust. You also provided a copy of your September 21, 2000, letter to the committee requesting approval of the establishment of the Trust, along with a copy of the proposed agreement establishing the Trust. The trust agreement between you, as trustor, and another individual, as trustee, empowers the trustee to accept funds, property, and services to pay legal fees and charges with respect to the purposes described below and Trust administration.

¹ The Florida couple pled guilty to unlawful interception of the call, and they were fined.

² The above account of the background for *Boehner v. McDermott* was derived principally from the opinions issued in the district and appellate court cases and from Advisory Opinion 1997-27 in which the Commission concluded that Mr. Boehner's use of his campaign funds to finance his suit against you was permissible under 2 U.S.C. §439a and 11 CFR Part 113.

The agreement describes the purposes of the trust as follows:

2. Trust Purpose. The sole and exclusive purpose of the Trust is to provide a proper means for the acceptance of money, property and services, including, if necessary, pro bono legal services, to provide for all reasonable, necessary and appropriate legal fees or charges incurred by the Trustor in connection with his official duties and position in Congress, and matters bearing on his reputation or fitness for office. To such end, the Trust shall be available to pay all reasonable, necessary and appropriate expenses of the Trustor's counsel and such other and usual, customary expenses that have been or may be incurred in connection with the above-stated purpose. The Trust may not be used to pay any legal expenses that arise in connection with a matter that is primarily personal in nature. Trust funds may be used for no purpose other than that specifically provided herein. All such payments may be made by the Trustee from either principal and/or income.

In granting you permission, the Ethics Committee noted that the purpose of the Trust would be to pay legal expenses arising from *Boehner v. McDermott*, and stated that “[y]our letter further indicates that, consistent with the requirements of the [Ethics Committee’s] Legal Expense Fund Regulations, these expenses have arisen in connection with your official duties and position in Congress, and that the matter is one that bears on your reputation or fitness for office.” The Ethics Committee also stated that the terms of the Trust appeared to be consistent with the Legal Expense Fund Regulations and went on to describe the public filing and disclosure requirements for such legal expense funds.

The Ethics Committee specifically noted that the purpose stated in the Trust agreement is broader than merely the expenses for *Boehner v. McDermott* and that, consistent with Ethics Committee regulations, the agreement states that the Trust may not be used to pay any legal expenses that arise in connection with a matter that is “primarily personal in nature.” The committee asked that you contact it for further guidance if any question arises as to whether a particular expense is properly payable out of the Trust. The committee also stated its understanding that the Trust agreement provides for the payment for legal service provided to you only, and to no other individual.

Although not specifically addressed in the Ethics Committee letter, the Commission also notes that the Trust agreement provides that the trust assets shall be maintained in accounts established for the exclusive purpose of administering the Trust, and segregated from your “personal, political, or official funds.” In addition, it provides that, upon completion of the Trust, any funds or assets remaining in the Trust, shall be distributed by the Trustee, in his sole and absolute discretion, to the contributors to the Trust, on a *pro rata* basis.

Analysis

To respond to your question, the Commission must discuss whether the donation of your campaign funds to the Trust would be “personal use” under the Act and Commission regulations, and then address whether the donation of another Member’s campaign funds to the Trust would constitute “personal use” by that Member.

Under the Act and Commission regulations, a candidate and the candidate’s committee have wide discretion in making expenditures to influence the candidate’s election, but may not convert campaign funds to the personal use of the candidate or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); *see also* Advisory Opinions 2000-37, 2000-12, 1998-1, and 1997-27. Commission regulations provide guidance regarding what would be considered personal use of campaign funds. Personal use is defined as “any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 CFR 113.1(g). Moreover, 2 U.S.C. §439a and 11 CFR 113.2(a) and (d) specifically provide that a Member of Congress may use excess campaign funds to pay any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, and may use such funds for “any other lawful purpose.”

Commission regulations list a number of expense categories that would constitute personal use. 11 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use, the Commission makes a determination on a case-by-case basis, using the regulation’s definition of personal use at 11 CFR 113.1(g). 11 CFR 113.1(g)(1)(ii).³ Legal expenses are among those uses to be analyzed on a case-by case basis. 11 CFR 113.1(g)(1)(ii)(A). *See* Advisory Opinions 1998-1, 1997-27, 1997-12, and 1996-24.

Based on the underlying circumstances of *Boehner v. McDermott*, the Commission concludes that the donation of funds from your principal campaign committee, Friends of Jim McDermott, to the Legal Expense Trust would be permissible because it would entail the use of campaign funds for an expense that would not exist irrespective of your duties as a Federal officeholder. The conduct that is at issue in *Boehner v. McDermott* resulted directly from activities that you engaged in because of your position at the time as Ranking Minority Member of the Ethics Committee. The issue of the finding as to the Speaker’s activities and the resulting disciplinary action was a matter of great interest in the House of Representatives. Any discussion by House Republican leaders of how to react to the pending agreement between the Speaker and the Ethics Committee would have been of significant concern to you because of your position

³ In explaining the application of the case-by-case approach, the Commission: reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.

Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 *Fed. Reg.* 7862, 7867 (February 9, 1995).

as Ranking Member and your prior consideration of the Speaker's activities as a member of the committee, and it appears that you received the tape because of your position. *See* Advisory Opinion 1997-27 where the Commission concluded that Mr. Boehner could use campaign funds to finance his case against you based on the fact that his involvement in the conversation was in pursuit of his duties as a Member and as part of the House Republican leadership, and the fact that the unlawful interception or disclosure for which he seeks the judicial remedy of compensation occurred as a result of interest in the content, which related to the House Republican leadership and the Ethics Committee, and interest in the fact that the participants were House Republican leaders.

The Commission concludes that the donation of your campaign funds to the Trust is permissible on the condition that the Trust's funds will be used only for: (1) expenses related to *Boehner v. McDermott* or other legal expenses arising out of the same set of facts; (2) the administrative expenses necessary to administer the Trust (including reasonable compensation to the Trustee); and (3) the dissemination of funds remaining at the termination of the Trust in accordance with the Trust agreement in order to prevent the personal use of your campaign funds by others. Any other use of funds by the Trust would present a different set of facts requiring separate examination by the Commission. The Trust agreement's requirement that Trust accounts will be segregated from any other accounts, such as your personal accounts, is also essential to the Commission's opinion. The Commission notes that, even though the Ethics Committee concluded or assumed that the expenses "have arisen in connection with your official duties and position in Congress," the Commission has the authority to interpret and enforce the personal use prohibition of 2 U.S.C. §439a and reach its own conclusions as to whether personal use of campaign funds would result. *See* Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 *Fed. Reg.* 7862, 7871 (February 9, 1995).

The regulations on personal use also address "third party payments" to candidates at 11 CFR 113.1(g)(6). Notwithstanding that the use of funds for a particular expense would be a personal use under 11 CFR Part 113, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under 11 CFR 100.7, unless the payment would have been made irrespective of the candidacy. The regulations list three examples of payments that are considered to be irrespective of candidacy. One of the examples is "a donation to a legal expense trust established in accordance with the rules of the United States Senate or the United States House of Representatives." 11 CFR 113.1(g)(6)(i). Therefore, donations to the Jim McDermott Legal Expense Trust would not be contributions, and would not be subject to the contribution limitations and prohibitions of the Act. *See* 2 U.S.C. §§441a, 441b, 441c, 441e, 441f, and 441g.

Commission regulations, nonetheless, do not specifically address whether the donation of campaign funds by one Member of Congress to a legal expense trust set up by another Member would be a personal use of campaign funds by the donor Member. Given the nature of the litigation for which the Trust was established and the nature of the

Trust, the Commission concludes that donations of other Members' campaign funds to the Trust would not constitute personal use of campaign funds by those Members and would therefore be permissible under 2 U.S.C. §439a and 11 CFR Part 113.

The case of *Boehner v. McDermott* implicates a dispute between Members of Congress concerning the propriety of actions that were taken with respect to a matter of concern in the House of Representatives. This litigation may present matters of institutional concern for all Members of the House and may pertain to the conduct of each Member, in his or her capacity as a Member of the House.

The nature of the Trust is also important to the conclusion as to the use of Mr. Stark's campaign funds. The Trust is established and maintained independently of your campaign and of any other funds. It has been formed under the House rules (Rule 26) and regulations issued by the Ethics Committee which restrict a legal expense trust's purposes, the sources and uses of donations, and the disposition of any residual funds.⁴ Pursuant to the conditions stated in this opinion, the dissemination and use of the funds donated to the Trust are restricted in order to prevent the personal use of campaign funds by you or others. Most importantly, the funds in the Trust will be used exclusively (other than for administrative costs and dissemination at the end) for *Boehner v. McDermott* or legal expenses arising out of the same set of facts. Under these conditions, it is clear that Mr. Stark's donation of campaign funds to the Trust will be used for expenses that relate to Mr. Stark's interest as a Member of the House. Thus, the donation by Mr. Stark of his campaign funds will be made for an expense that would not exist irrespective of his duties as a Federal officeholder. See 11 CFR 113.1(g).

Given the facts and conditions presented in your request, the Trust may accept donations from the principal campaign (or other authorized) committees of Mr. Stark and other House Members. Such donations will not be contributions under the Act; nor will they be a prohibited personal use of campaign funds. Any authorized committee that makes such donations to the Trust is, however, required to disclose them as other disbursements on reports it must file under the Act and Commission regulations. 2 U.S.C. §434(b)(4)(G) and (6)(A); 11 CFR 104.3(b)(2)(vi) and (4)(vi).

The Commission expresses no opinion regarding the application of any rules of the U.S. House of Representatives or any tax ramifications of the proposed activity because those issues are not within its jurisdiction.

⁴ The House rules and regulations impose a \$5,000 yearly limitation on donations from any individual or organization and prohibit donations from registered lobbyists or agents of foreign principals.

This response constitutes an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. *See* 2 U.S.C. §437f.

Sincerely,

(signed)

Danny L. McDonald
Chairman

Enclosures (AOs 2000-37, 2000-12, 1998-1, 1997-27, 1997-12, and 1996-24)